# Towards the Uncertainties of a Hard Brexit: An Opportunity for International Arbitration

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Last week, Theresa May delivered her long-awaited speech setting out Britain's broad objectives in forthcoming Brexit negotiations with the EU. She confirmed the rumours of a "hard Brexit" by indicating Her Majesty's Government's intention to see the UK out from the Single Market and the Custom Union and to seek *"a new and equal partnership [...], not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave"*. She further warned the EU negotiators that *"no deal for Britain is better than a bad deal for Britain"* and highlighted her willingness to build a *"Global Britain"*, *"free to strike trade agreements with countries from outside the European Union"*.

Whether this blueprint towards a hard Brexit will lead to a *"stronger, fairer, more Global Britain"* has yet to be seen, but may well offer new opportunities to commercial and investment arbitration.

Brexit, with or without a deal, should not be effective before mid-2019 at the earliest. Although Theresa May had announced the triggering of Article 50 TFEU before the end of March 2017, this date could be postponed because of Tuesday's ruling of the UK Supreme Court ([2017] UKSC 5) prescribing an Act of Parliament for the triggering of Article 50. It will then be highly likely that the negotiations between the EU and the UK will last at least the two-year period provided for by this provision.

The consequences of Brexit for international litigations and the drafting of international contracts may therefore be seen as relatively remote. That, however, would mean forgetting that many of the dispute resolution clauses of the contracts concluded today will be relied upon in several years, i.e. after the UK's withdrawal from the EU. In this context, drafters of international contracts with UK/EU aspects seeking legal certainty would be well advised to opt for international arbitration rather than

litigation. Indeed, as summarised below, a hard Brexit will have an uncertain, and potentially significant, impact on private international law whereas its legal consequences on international commercial arbitration should be foreseeable and limited.

Private international law has been gradually harmonised at the EU level. In civil and commercial matters, the law applicable to contractual and non-contractual obligations is mainly governed by, respectively, the EU Rome I and Rome II regulations whereas conflicts of jurisdictions and judicial cooperation are governed by the EU Brussels I recast regulation and the Lugano Convention (which has extended the Brussels I regulation's regime to Iceland, Norway and Switzerland). In addition, many other ancillary instruments, aiming at building other aspects of the European judicial area, have also been adopted at the EU level (e.g. common rules on taking of evidence, harmonised procedures such as the European enforcement order for uncontested claims, etc.).

In order to *"provide certainty wherever we can"*, Theresa May indicated that *"as we repeal the European Communities Act, we will convert the 'acquis' – the body of existing EU law – into British law"*. This should be done without hurdles with regard to choice of law. The UK could indeed replicate the rules of the Rome I and Rome II regulations into its domestic legislation. Since these instruments have a universal nature, EU courts will continue to apply them even if the choice of law rules lead to the application of English law.

However, the same does not apply to conflicts of jurisdictions and the European judicial area which are based on reciprocity. The mere fact of the UK implementing the rules of the Brussels I recast regulation and the other ancillary instruments into its domestic law would not entail the application of these rules by the courts of EU Member States facing an English judgment, a jurisdiction clause designating English courts or parallel proceedings conducted in England. In the absence of a specific convention, the UK will be considered as a third State for the application of these instruments.

Besides an *ad hoc* mechanism extending the Brussels I recast regulation regime to the UK, it has been argued that several other private international law instruments could potentially be relied on in order to avoid these consequences: the 2007 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters; the 2005 The Hague Convention on choice of court agreements; the 1968 Brussels Convention (predecessor to the Brussels I regulation) or the eight bilateral enforcement treaties concluded before the European harmonisation by the UK with, respectively, Austria, Belgium, France, Germany, Italy, the Netherlands and Norway.

However, the most straightforward of these alternatives seem difficult to reconcile with a hard Brexit while the remaining ones are far from providing a comprehensive set of rules:

• the extension of the Brussels I recast regulation to the UK is jeopardised by Theresa May's declarations that the UK refuses to *"comply with the EU's rules and regulations without having a vote on what those rules and regulations are"* and *"will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain"*;
• the adoption of the 2007 Lugano Convention would either require the UK to become a member of the European Free Trade Association – which does not appear compatible with Theresa May's statement that the UK *"does not seek to adopt a model already enjoyed by other countries"* – or to get the unanimous consent of the parties to this Convention. It would also imply the acceptance of the jurisdiction of the ECJ (see the Protocol No. 2 to the Lugano Convention). Finally, the Lugano Convention does not implement the changes brought by the recast of the Brussels regulation;
• the material scope of the 2005 The Hague Convention is limited to exclusive jurisdiction clauses concluded between professionals. Its temporal scope may also be problematic since the Convention applies merely to jurisdiction clauses concluded after the entry into force of the Convention for the State of the chosen court;

• a “revival” of the 1968 Brussels Convention appears legally doubtful since this instrument was adopted under Article 220 of the Treaty of Rome in order to develop a common judicial area between the European Community’s Member States. It would also imply the jurisdiction of the ECJ – rejected by Theresa May’s blueprint – and the application of outdated rules;
• a “revival” of the bilateral treaties appears more likely from a legal standpoint but these treaties are limited to the eight EU/EFTA above-mentioned States, have a limited material scope and provide for rather outdated rules;
• finally, transitional questions – such as the rules applicable to the recognition and enforcement, after the UK’s withdrawal, of judgments rendered before this withdrawal – are also likely to lead to further uncertainty.

In a European/Lugano context, the rules that will be applicable to the recognition and enforcement of English judgments, the jurisdiction clauses designating English courts and parallel proceedings with English courts are therefore likely to raise complex legal questions and be subject to uncertainties following an effective Brexit.

In contrast, the legal consequences of Brexit on international commercial arbitration should be limited and foreseeable since this field has been harmonised at an international rather than at an EU level and is expressly excluded from the Brussels I recast and Rome I regulations.

The 1958 New York Convention will continue to ensure the recognition and enforcement of arbitration clauses and awards in the more than 150 signatory countries (including the UK and the remaining EU Member States). As developed in a previous post of this blog, the enforceability of English seated arbitration clauses will be enhanced following Brexit, since English courts will unequivocally regain the ability to immobilise proceedings in Member State courts brought in breach of an arbitration agreement. It is indeed still unclear whether the findings of the ECJ *West Tankers* case (C-185/07), i.e. the prohibition of anti-suit injunctions within the EU, continues to apply following the “clarification” of the scope of the arbitration exception by the Brussels I recast regulation. In the *Gazprom* case, rendered after the recast, the ECJ has upheld the possibility for arbitral tribunals to order anti-suit injunctions but did not follow its Advocate General who pleaded for a general admissibility of anti-suit injunctions, whether ordered by arbitral tribunals or domestic courts. Brexit should put an end to these discussions since the UK Supreme Court ([2013] UKSC 35) has confirmed the English court’s power to issue anti-suit injunctions save for the “European inroad”.

Finally, the new opportunities offered by Brexit in the field of investment arbitration have already been highlighted in this blog. Theresa May’s blueprint confirmed the UK Government’s eagerness to conclude new free-trade agreements, with the EU, the US and commonwealth nations in particular. Given the UK’s tradition in this regard, and the importance of London in the investment arbitration market, these free-trade agreements are likely to provide for arbitration with regard to investor-state disputes though this perspective is less likely for the potential UK-EU free-trade agreement. In the wake of the CETA’s adoption, Wallonia’s rebuff and several demonstrations across Europe (notably in Germany) have indeed shown a growing mistrust of investment arbitration in the EU.

*The views expressed herein reflect only the views of the author.*
*For a more detailed analysis of the consequences of Brexit on private international law and international arbitration, see our recent article (in French): Fog in Channel – Continent Cut Off, Journal des Tribunaux, 2017/2, pp. 24 et seq. and the special issue of the Journal of International Arbitration.*